JUL [illegible] 1968

NO. 22688

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TY OF SELDOVIA and ABE)
OMAS,)
)
Appellants,)
)
vs.)
)
LOYERS' LIABILITY ASSURANCE)
PORATION, LTD.,)
)
Appellee.)
)

FILED
JUL 16 1968
WM. B. LUCK, CLERK

BRIEF FOR APPELLEE

HUGHES, THORSNESS, LOWE,
GANTZ & CLARK
807 G Street
Anchorage, Alaska 99501

Attorneys for Appellee
Employers' Liability
Assurance Corporation, Ltd.

By: Robert C. Erwin

SUBJECT INDEX

mis

ion

atry

ica

gil
.Su

e v.
No.

oyers
ance

TABLE OF AUTHORITIES

ES CITED:

ohn
78

mo

ngf
dem

vel
daho

ndgr
n C

cDon
5, 4

Carth
rpora
v. 19

noe
33,

not
967

tide
(67)

tate
ssi

heod

R.
aran

nter
. 1

se

F

m

3

1 N

ros
364

est

U

Un

Un

Ur

ULES AND STATUTES:

EXTS AND TREATISES:

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit has juris-
ction to review final decisions in civil actions from the
ited States District Court for the District of Alaska (28
S.C.A. 1291, 1924).

The suit in question herein was a declaratory judgment
tion brought pursuant to 28 U.S.C.A. 2201 and 1332 and was based
diversity of citizenship and an amount in controversy in
cess of $10,000.00. (Complaint R 2, 3, 75A - Answers 62,
; 110-111, R 185). The decision was rendered on November 28,
66 and a formal decision entered on November 30, 1966.
237-241). Appellants notice of appeal was filed on
cember 28, 1966 (R 250) within the time limits set by this
urt.

STATEMENT OF CASE

On September 19, 1965, Abe Thomas, Police Chief for e City of Seldovia arrested Charles Ramon McEwen for certain fenses (R 171-173). In the process of such arrest Charles Ewen was shot in the abdomen necessitating hospitalization Providence Hospital at Anchorage, Alaska (R 63, Par. VI, 3, 154).

As a result of the incident in question, Charles McEwen led a claim against the City of Seldovia on December 13, 1965 198), and said claim was forwarded to Preferred General ency of Alaska, Inc., as agents for appellee (R 198). In swer to the letter forwarding the claim, Mr. T. H. Reed, perintendent of the Alaska Claims Office for appellee sent e following letter on December 22, 1965 (R 199-200) to the torneys for the City of Seldovia:

"December 22, 1965

Mr. John E. Havelock
Seldovia City Attorney
Guess, Rudd & Havelock
Attorneys at Law
P. O. Box 1332
Anchorage, Alaska

Re: 0-122302-A
Charles McEwen vs. City of Seldovia

Dear Mr. Havelock:

Mr. Hartman of Preferred General Agency has forwarded your letter and claim against the City to this office for handling.

ge

The Employers' Liability Assurance Corporation, Ltd. does not waive any rights under the terms of the policy number E35-2049-81 issued to the City of Seldovia.

Among other rights that the Employers' Liability Assurance Corp., Ltd. may have by investigating or defending a lawsuit, the company does not waive any right to disclaim coverage on the grounds that the injury complained of was caused intentionally by or at the direction of the insured, or that the allegations do not fall within the scope of coverage.

By the very nature of the claim, the acts alleged consist of false imprisonment, unlawful arrest and assault and battery which come within the standard definition as set forth in policy exclusions Section "O" which specifically provides -

> (O) Under coverage A, B, and C to bodily injury or injury or destruction of property caused intentionally by or at the direction of the insured.

It is further noted that the claim sets forth a prayer for $200,000 which is greatly in excess of the City of Seldovia policy limits of $5,000.00. Please be advised that this letter will serve as notice of the excess.

In the event of a judgment in excess of policy limits or a verdict for damages not falling within the scope of coverage the City of Seldovia will be held liable for any and all amounts over and above the limits and provisions of policy #CLE35-2049-81.

The Employers' Liability Assurance Corp., Ltd. and their attorneys will be happy to cooperate with you.

Very truly yours,

S/T. H. Reed

T. H. Reed
Superintendent

R:ged"

The next correspondence from the attorneys for the City Seldovia was a letter dated March 16, 1966 (R 201) which closed a copy of the summons and complaint of Charles Ewen against the City of Seldovia and Abe Thomas filed in e Superior Court for the State of Alaska, Third Judicial strict (R 201).

The complaint had been filed on December 13, 1965 (R 185) d had been served on the City of Seldovia on December 28, 1965 185). The City of Seldovia filed answer to the complaint on nuary 17, 1966 (R 185, 224) and participated in the following scovery procedures before notifying appellee that the suit d been filed:

> 1. Attended the deposition of Abe Thomas taken by attorneys for McEwen on January 31, 1966 (R 142).
>
> 2. Attended the deposition of Richard Wolf taken by attorneys for McEwen on March 3, 1966 (R 142).
>
> 3. Attended the deposition of Jack R. Simpson taken by attorneys for McEwen on March 7, 1966 (R 142).
>
> 4. Did not contest in any way a motion for inspection and copying 'all written statements of witnesses to the occurrence which is the subject matter of the complaint including any and all written statements of the defendants or the plaintiff which may be in the possession of the defendants . . . including photographs and diagrams of the scene," filed on February 25, 1966 and granted by the Superior Court on March 10, 1966' (R 209-211).
>
> 5. Attended the deposition of Doris Fleck medical records librarian at Providence Hospital, taken by attorneys for McEwen on March 7, 1966 (R 185).

6. On March 31, after sending the letter of March 16 to appellees concerning the suit in question, appellant stipulated with attorneys for plaintiff, McEwen, to take the deposition of Charles McEwen at Salt Lake City, Utah on April 9, 1966 (R 187, 225).

7. Notice of the taking of depositions, together with subpoenas for appearances were served on witnesses Bryant, Brewster, Knight, Charlotte, Eaulsos and Reardon for March 9 and 10 at Seldovia, Alaska but such depositions were not taken because bad weather prevented the attorneys from getting to Seldovia, Alaska (R 226). However, the investigator working on behalf of McEwen did discuss the case with the witnesses Bryant, Brewster and Reardon at the time of service of said papers on March 1, 1966 (R 226).

The Declaratory Judgment action in the case at bar was mmenced on June 1, 1966 (R 8) and the litigation herein proessed through preliminary stages until appellant moved for mmary judgment on November 8, 1966 (R 145-156). Appellee then led a cross-motion for summary judgment (R 158-187) and the tter came on for hearing on December 2, 1966.

The court denied both motions for summary judgment on cember 9, 1966 (R 212) and set the case down for pretrial nference on motion from appellee (R 213-215, 218-220). At informal conference held in lieu of the pretrial conference 221) the parties indicated that an agreed state of facts d been arrived at and the case would be resubmitted to the urt for decision (R 222).

Subsequently, on June 26, 1967 a "stipulation of facts" s filed with the court concerning the facts of the case

R 223-226). Subsequently, on November 28, 1967, the District ourt rendered a Memoradnum of Decision and Order as follows: R 237-239).

> "MEMORANDUM OF DECISION AND ORDER
>
> In the above entitled matter, the parties filed cross motions for summary judgment which were denied by the court on December 9, 1966. Subsequently, a stipulation of facts was filed and by agreement of counsel the matter was submitted for decision on the record and the stipulation of facts.
>
> After due consideration, the court finds that the letter of September 27, 1965, from the City of Seldovia to Providence Hospital, and the letter dated October 12, 1965, from Mr. Occhipinti to the City of Seldovia, did not constitute a denial of coverage. The letter from the attorney for the City of Seldovia dated December 13, 1965, to Mr. Hartman of Preferred General Agency clearly indicates that the city did not then consider that coverage had been denied.
>
> Mr. Reed's letter of December 22, 1965 to the attorneys for the City of Seldovia is not a denial of coverage. The letter merely contains a reservation of rights and gives notice of the fact that the amount claimed was far in excess of the limits of the coverage provided by the policy issued to the City. The defendant's claim of a denial of coverage is entirely inconsistent with the following statements recited in the December 22 letter:
>
>> 'Among other rights that the Employers' Liability Assurance Corp., Ltd. may have by investigating or defending a lawsuit, the Company does not waive any right to disclaim coverage on the grounds that the injury complained of was caused intentionally by or at the direction of the insured, or that the allegations do not fall within the scope of coverage.' * * *

> 'The Employers' Liability Assurance Corp., Ltd. and their attorneys will be happy to cooperate with you.'

The complaint in the State Superior Court case was filed on December 13, 1965. On January 17, 1966, the City filed an answer to the complaint. Notice of the suit was not given to the Company until March 16, 1966.

Condition No. 10 contained in the policy provided as follows:

> '10. NOTICE OF CLAIM OR SUIT. If claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.'

Summons or other process received by the City in connection with the action commenced in the State Superior Court was not immediately forwarded to the Company within the meaning of Condition 10 set forth above.

Condition 12 of the policy provides:

> '12. ACTION AGAINST COMPANY. No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, * * *'

Plaintiff did not by its actions, or otherwise, waive any of its rights under the policy. To the contrary, all rights were specially reserved by its letter of December 22, 1965 addressed to the attorneys for the City of Seldovia.

On the basis of the reasoning and authorities contained in plaintiff's memo in opposition to defendants' motion for summary judgment and in support of plaintiff's motion for summary judgment filed November 10, 1966, plaintiff is entitled to summary judgment as a matter of law and defendants' motion for summary judgment must be denied.

Within ten (10) days, plaintiff will prepare, serve and submit to the court a proposed form of summary judgment.

It is so ORDERED.

S/Raymond E. Plummer
United States District Judge

DATED: Nov. 28, 1967"

After formal judgment was signed, this appeal followed.

[illegible]

[illegible]

at

c

j

i

ar

,

wa

ab

we

pr

is c

SUMMARY OF ARGUMENT

The basis for Appellant's argument is the contention at the Reservation of Rights letter sent on December 22, 1965 s in reality a refusal to defend which waived any obligation the City of Seldovia to forward suit papers, etc. when rved and further permitted the City of Seldovia to actively fend the lawsuit in question unless the appellee could tablish prejudice from such actions.

The trial court found that the letter was not a refusal defend and such a decision is binding herein because it is t clearly erroneous - Lundgren v. Freeman, 307 F.2d 104, 4-115 (9th Cir. 1962). Further the trial court determined at the law to be applied in this diversity case in the absence controlling Alaska decision would eliminate a need to show ejudice for a violation of a condition of the policy, and is submitted that this finding as to local law is binding cause it is not clearly erroneous. Owens v. White, 380 F.2d 0, 315 (9th Cir. 1967).

The undisputed and stipulated facts show a failure to rward the suit papers from December 28 until March 16 and tablish that in the intervening period the Appellant filed swer, participated in the taking of 4 depositions and agreed produce all documentary evidence in the case without limit. is constituted a violation of both the condition to forward

ch papers immediately and the cooperation clause and titled Appellee to summary judgment herein.

Additionally the original complaint against appellant rein alleged events outside the coverage of the policy and us there was no wrongful failure to defend the lawsuit ainst the City of Seldovia.

ARGUMENT

ARGUMENT IN ANSWER TO CONTENTION OF APPELLANTS THAT APPELLEE WAIVED ANY REQUIREMENT OF FORWARDING SUIT PAPERS TO COMPANY BY SENDING THEM A RESERVATION OF RIGHTS LETTER.

The entire argument of the City of Seldovia herein is sed upon the premise that the letter of December 22, 1965 s a refusal to defend under the policy of insurance and us waived compliance with the conditions of the policy. e letter itself is set forth completely herein to show at while it may contain a reservation of rights, the letter not a refusal to undertake the defense, and any such terpretation by the City of Seldovia is not warranted by e letter itself: (R 165-166, 230-231).

> "Mr. John E. Havelock
> Seldovia City Attorney
> Guess, Rudd & Havelock
> Attorneys at Law
> P. O. Box 1332
> Anchorage, Alaska
>
> Re: 0-122302-A
> Charles McEwen v. City of Seldovia
>
> Dear Mr. Havelock:
>
> Mr. Hartman of Preferred General Agency has forwarded your letter and claim against the City to this office for handling.
>
> The Employers' Liability Assurance Corporation, Ltd. does not waive any rights under the terms of policy number E35-2049-81; issued to the City of Seldovia.
>
> Among other rights that the Employers' Liability Assurance Corp., Ltd. may have by investigating or defending a lawsuit, the

A

h the

urance

> company does not waive any right to disclaim coverage on the grounds that the injury complained of was caused intentionally by or at the direction of the insured, or that the allegations do not fall within the scope of coverage.
>
> By the very nature of the claim, the acts alleged consist of false imprisonment, unlawful arrest and assault and battery which come within the standard definition as set forth in policy exclusions Section "O" which specifically provides -
>
> (O) Under coverage A, B, and C to bodily injury or injury or destruction of property caused intentionally by or at the direction of the insured.
>
> It is further noted that the claim sets forth a prayer for $200,000 which is greatly in excess of the City of Seldovia policy limits of $5,000.00. Please be advised that this letter will serve as notice of the excess.
>
> In the event of a judgment in excess of policy limits, or a verdict for damages not falling within the scope of coverage the City of Seldovia will be held liable for any and all amounts over and above the limits and provisions of policy #CLE35-2049-81.
>
> The Employers' Liability Assurance Corp., Ltd., and their attorneys will be happy to cooperate with you.
>
> Very truly yours,
>
> s/ T. H. Reed
>
> T. H. Reed
> Superintendent"

Appellant, City of Seldovia, appears to be unfamiliar th the need for a Reservation of Rights letter by an surance company in a case where there may be a problem of

nsurance coverage, but the great weight of authority clearly upports the proposition that if the company undertakes the efense of a cause of action without reserving any question f coverage, any policy defenses are deemed waived. 38 A.L.R. d 1148.

> "The law on the point under annotation may be summarized briefly. The general rule is this: a liability insurer, by assuming the defense of an action against the insured, it is thereafter estopped to claim that the loss resulting to the insured from an adverse judgment in such action is not within the coverage of the policy, or to assert against the insured some other defense existing at the time of the accident.
>
> * * *
>
> The general rule of estoppel is also limited by the principle that a liability insurer may avoid the operation of the rule by giving the insured timely notice that, notwithstanding its defense of the action against him, it has not waived the defenses available to it against the insured. Such notice, to be effective, must fairly inform the insured of the insurer's position, and must be timely, although delay in giving notice will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense." (pp. 1150 and 1151).

If the letter from Tom Reed is construed according to ts written language as a reservation of rights letter which oes not deny coverage, then the actions of the defendant, City f Seldovia, must be considered as a breach of the contract etween plaintiff and defendant, City of Seldovia, and as a

atter of law the plaintiff was entitled to summary judgment nder the provisions of Rule 56(a) of the Federal Rules of ivil Procedure.

In his memorandum of decision, Judge Plummer held that he Reed letter was not a denial of coverage and found as ollows: (R 238).

> "Mr. Reed's letter of December 22, 1965 to the attorneys for the City of Seldovia is not a denial of coverage. The letter merely contains a reservation of rights and gives notice of the fact that the amount claimed was far in excess of the limits of the coverage provided by the policy issued to the city. The defendant's claim of a denial of coverage is entirely inconsistent with the following statements recited in the December 22 letter: (quote omitted)."

It is submitted that this finding of fact is ontrolling unless found to be clearly erroneous. Lundgren v. reeman, 307 F.2d 104, 114-115 (9th Cir. 1962); Snider v. ngland, 374 F.2d 717, 726 (9th Cir. 1967); 55 California Law eview 1053 (1967); 41 Minnesota Law Review 764 (1967); and ince the letter itself supports the finding of the trial ourt, the argument of appellant on waiver of condition recedent by appellee is without merit.

ido

ici

emb

plai

Seld

185,

edur

ed;

ARGUMENT IN ANSWER TO CONTENTION THERE WAS NO BREACH OF POLICY PROVISIONS BY APPELLANT.

The cross-motion for summary judgment granted by the ial court was based upon the legal position that the City Seldovia failed to forward the suit papers for a period of venty-five (75) days after they had been served upon them, d further that the City of Seldovia breached its duty of operation in defense of the cause of action without pertting the plaintiff its right to defend. Each topic will discussed separately to show they provide alternative asons why plaintiff is entitled to summary judgment as a tter of law.

A. Failure to Notify Plaintiff That Suit Had Been Commenced.

In the case at bar, the suit against the City of ldovia was filed in the Superior Court for the Third dicial District on December 13, 1965 and was served on cember 28, 1965 (R 185). However, no notice was forwarded plaintiff herein until March 16, 1966. (R 201). The City Seldovia filed answer to the complaint on January 17, 1966 185, 224) and participated in the following discovery ocedures before notifying appellee that the suit had been led:

1. Attended the deposition of Abe Thomas taken by attorneys for McEwen on January 31, 1966 (R 142).

2. Attended the deposition of Richard Wolf taken by attorneys for McEwen on March 3, 1966 (R 142).

3. Attended the deposition of Jack R. Simpson taken by attorneys for McEwen on March 7, 1966 (R 142).

4. Attended the deposition of Doris Fleck, medical records librarian at Providence Hospital, taken by attorneys for McEwen on March 7, 1966 (R 185).

5. Did not contest in any way a motion for inspection and copying 'all written statements of witnesses to the occurrence which is the subject matter of the complaint including any and all written statements of the defendants or the plaintiff which may be in the possession of the defendants . . . including photographs and diagrams of the scene' filed on February 25, 1966 and granted by the Superior Court on March 10, 1966 (R 209-211).

Additionally, on March 31, after sending letter of March 6 to appellee concerning the suit in question, appellant tipulated with attorneys for plaintiff, McEwen, to take the eposition of Charles McEwen at Salt Lake City, Utah on April , 1966 (R 187, 225).

Notice of the taking of depositions, together with sub- oenas for appearances had been served on witnesses Bryant, rewster, Knight, Charlotte, Eaulsos and Reardon for March 9 nd 10 at Seldovia, Alaska but such depositions were not taken ecause bad weather prevented the attorneys from getting to eldovia, Alaska (R 226). However, the investigator working n behalf of McEwen did discuss the case with the witnesses ryant, Brewster and Reardon at the time of service of said apers on March 1, 1966 (R 226).

The policy in question herein specifically provides that he insured will immediately forward any suit papers which are erved upon him to the company herein. (R 31, 60, 83, 119).

> "If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative." (Condition No. 10)

ection 12 further provides that such action by the insured ould be a condition precedent to recover under the policy. R 31, 60, 83, 119).

The general rule concerning the failure of the insured o forward the suit papers within a reasonable time is set orth in 18 A.L.R.2d 443 in the Annotation entitled "Liability nsurance: clause with respect to notice of accident or claim, tc., or with respect to forwarding suit papers":

> "(1) It is well settled that a provision in a liability policy requiring the giving of notice of accident and claim and the forwarding of suit papers to the insurer is a reasonable and valid stipulation, its purpose being to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances.
>
> (2) Regarding the nature and effect of the clause, a distinction has been made between policies which expressly make compliance with the clause a condition precedent to the liability of the insurer under the policy, and those which admit such an expressed statement. Wherever the liability policy makes the insured's failure to give timely notice

> expressly the grounds of forfeiture, or compliance therewith a condition precedent to the insurer's liability, no recovery can be had where timely notice has not been given. . ." (p. 447)

A similar view has been recently followed by the United ates District Court for the District of Alaska in the case General Accident Fire and Life Assurance Corp. Ltd. v. Prosser, 9 F.Supp. 735 (D.C. Alaska 1965) where the following statement s made on page 739:

> "There is no ambiguity in the terms of the policy involved in this case. Where, as herein, the policy in express terms makes the giving of notice a condition precedent, the insurer is not required to show prejudice and the failure to comply with the terms and conditions of the policy will bar recovery." (Citations omitted).

It should be noted at this time that in another recent inion Ness v. National Indemnity Co., 247 F.Supp. 944, 948 .C. Alaska 1965), the United States District Court for the strict of Alaska again pointed out the rules which should be nsidered in determining whether or not the policy of insurance ambiguous:

> "Courts have no power to make or rewrite contracts of insurance, and where the terms of the contract are clear and unambiguous, it is the duty of the court to enforce the contract as written. (Citation omitted).
>
> In Stock and Grove, Inc. v. City of Juneau, Alaska, 403 P.2d 171, Opinion No. 292, June 21, 1965, the Supreme Court of Alaska stated as a general rule of law that the clear

er

ur

il

en

> and unambiguous terms of a contract may be interpreted by the general and accepted usage of the trade of business involved.
>
> In Pepsi Cola Bottling Co. of Anchorage, Inc. v. New Hampshire Ins. Co., et al, Alaska, 407 P.2d 1009, Opinion No. 308, November 26, 1965, the same court stated that it was in agreement with those authorities which hold where the terms of the policy of insurance are clear and unambiguous, the intent of the parties must be ascertained from the instrument itself.
>
> This court is satisfied that if the Supreme Court of Alaska were called upon to decide the question as raised in this case, it would do so in accordance with the basic and well-established principles of law stated herein, its pronouncements in Stock and Grove and Pepsi Cola, and in accordance with sound reasoning and common sense. . ."

ee also, 8 Appleman, Insurance Law and Practice, Section 47.40 page 59.

In the case of <u>Aufderhar v. American Employer's Ins. Co.</u>, 31 F.2d 681 (8th Cir. 1964), the trial court ruling holding ere was no duty to defend was upheld by the Eighth Circuit ourt of Appeals where it appeared that the omnibus insured ailed to notify the company even though he knew a suit had een commenced against him.

> "Thus, in the instant case, the insured, with knowledge of his coverage from participation in settlement of a prior claim and notice of action's pendency

onn

our

oul

fo

> breached a valid provision of the policy by neglecting to inform the insurer of the pendency of the action. Moreover, it is readily discernible from the Arkansas Supreme Court's rationale in Warren, supra, that substantial compliance with the notice provisions of the insurance policy with respect to an insured's duty to inform the insurer when served with process would control in like manner when the insured had only knowledge of the lawsuit, since the provision's purpose of availing the insurer the opportunity to prepare its course of action without prejudice of delay would be equally served in both instances." (p. 685).

In the case of Aetna Casualty & Surety Co. of Hartford, onn. v. Martin, 377 S.W.2d 583, 585 (Ky. 1964), the Kentucky ourt of Appeals held that prejudice to the insurance carrier ould be presumed where the insured waited 60 days before nforming the company that a suit had been commenced:

> "There is, however, no question that as a matter of law there was a breach of the condition in the policy by Mullins in waiting more than sixty days before forwarding the process to the appellant. The term "immediately forward" means within a reasonable time. (Citation omitted). Mullins' failure was due simply to his lack of interest in promptly informing himself of the nature of the claim against him and his unwarranted assumption that the appellant would protect him and itself without action on his part. The inquiry into whether or not there was prejudice to the appellant occasioned by this unreasonable delay is not germane; prejudice to the insurer is presumed." (Citation omitted).

In the case of DeVigil v. General Accident Fire & Life ns. Co., 146 F.Supp. 729 (D.C. Hawaii 1956), the United tates District Court for Hawaii granted summary judgment for ailure of insured to forward the suit papers even though ne company obtained notice of the suit from another source.

> "The record in this case fails to support plaintiff's claim that performance of the 'forwarding of all suit papers' condition was waived. Although the defendant insurance company had written notice of a potential claim against Meyers and was aware of the fact that plaintiff had filed an action against him, the company was not required to defend its assured because of his failure to comply with condition 7 of the policy." (p. 731).

In the case of National Surety Corp. v. Wells, 287 F.2d)2 (5th Cir. 1961), the Fifth Circuit Court of Appeals noted nat Texas decisions followed the rule presuming prejudice from ne failure to forward suit papers unless some reasonable reason ppeared for the failure to do so:

> "In assaying the correctness of the District Court's disposition, we start with the acceptance of the Insurer's assertion that with respect to forwarding legal process, just as in the situation concerning notice of the occurrence, Texas regards as immaterial a showing of prejudice. (Citations omitted). If the condition of the policy is not satisfied, the contract is treated as breached and the Assured fails, not because what he did not do injured the insurer, but rather because the assured did not perform his contractural obligations." (p. 105).

ra

aw

re

rovi

f the

heir i

e def

See Lamont v. State Farm Mutual Automobile Ins. Co., 51 N.E.2d 701, 704 (Ind. 1958); State Farm Mutual Automobile ns. Co. v. Cassinelli, 216 P.2d 606, 616 (Nev. 1950); interton v. VanZandt, 351 S.W.2d 696, 702 (Mo. 1961).

Thus, in the case at bar, the failure of the City of eldovia to forward the suit papers for 75 days was a vioation of a condition precedent under the policy especially a case where the defendant's own counsel was taking an tive part in preparation of the lawsuit.

B. Failure to Cooperate by Defending Suit.

As an alternative and totally independent ground for anting summary judgment herein, it is urged as a matter of w the actions of the defendant, City of Seldovia set forth erein constitutes a breach of the cooperation clause which ovides as follows: (R 31, 60, 83, 119).

> "The insured shall cooperate with the company and upon the company's request shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. . ." (condition 11).

The City of Seldovia did not cooperate in the defense the suit; they simply defended the suit without notifying eir insurance carrier. The right of the insurer so far as e defense of a cause of action under the insurance is

Risjord and Austin, in an article entitled "Obligation f Insurer to Defend After Exhaustion of Policy Limits" in 6 ederation of Insurance Counsel Quarterly, 18 on page 822 lso states:

> "As a necessary corollary to insurance against liability in place of indemnity against loss, the insurance policies, for the protection of the insurer, provide that the insurer should have both the duty and the exclusive right to defend the insured."

In the case of Auerbach v. Maryland Casualty Co., 140 .E. 577, 579 (N.Y. 1923), the exclusive nature of the insurance ontract permitting the insurer to defend the cause of action s set forth as follows:

> ". . . The Plaintiffs when they accepted the policy, did so with full knowledge of the fact, if any action were brought, that they surrender to the insurance company absolute, full and complete control of it, including settlement or trial. . . ."

Similarly in Countryman v. Breen, 271 N.Y.S. 744, 747 ff'd 198 N.E. 536 (1932) a similar statement was made:

> "The insurance contract between Defendant and the company is an indemnity contract. The reason why absolute authority is given the insurer in the matter of settlements with claimants against the insured is obvious. And the authority of the insurer as to this is absolute. . . The insured cannot compel the insurer to settle nor prevent it from doing so. . ."

In an article found in 26 Insurance Counsel Journal, age 585, this right of control is explained in the following erms:

> "The right and control of the insurer over the defense of litigation brought against the insured within the preview of the policy is so absolute and unquestioned that in the absence of bad faith the insurer is immune from liability on account of its failure to accept the settlement offer in an amount within the policy limit where eventually a judgment is secured, the insured following its unsuccessful defense of the insured at the trial, (the decisions so holding are legion)."

In the case of <u>Dodge v. Fireman's Fund Ins. Co.</u>, 362 .W.2d 767, 769 (Mo. Ct. App. 1962), the Missouri Court of ppeals recognized this point in holding that the exclusive ight of control of the litigation under the insurance contract ests with the insurance company:

> "Since Fireman's Fund Insurance Company alone must pay any of the judgments obtained, it should have the exclusive right to control and conduct the whole defense rather than to share that responsibility with another insurance company whose excess coverage under the facts presented will not be called upon. It would be unjust to Fireman's Fund Insurance Company to declare that it has a duty to defend and the obligation to pay the judgment, if obtained, and still to permit Federal Mutual Insurance Company to participate in the control of the defense."

A similar view was expressed by the Supreme Court of owa in the case of <u>Railsback v. Buesch</u>, 114 N.W.2d 916, 918 Iowa 1962):

> "In cases of this type against insurance, the appointment of employee of plaintiff's attorney as administrator of the defendant's estate has not been considered improper, since the object of such appointment was to secure a representative of such estate against whom the creditor's claims might be asserted. (Citation omitted). It follows that the insurance company should have the right to control and conduct the defense and the administrator should not interfere with the legal exercise of that right. It appears counsel for claimant realized this because they filed written consent (subsequently orally enlarged) that the original order granting equitable relief be set aside and the matter stand for trial upon claimant's original application for equitable relief filed November 28, and as though no evidence had been introduced. . ."

In the case at bar the complaint had been filed on ecember 13, 1965 (R 185) and had been served on the City of eldovia on December 28, 1965 (R 185). The City of Seldovia iled an answer to the complaint on January 17, 1966 (R 185, 24) and participated in the following discovery procedures efore notifying appellee that the suit had been filed:

1. Attended the deposition of Abe Thomas taken by attorneys for McEwen on January 31, 1966 (R 142).

2. Attended the deposition of Richard Wolf taken by attorneys for McEwen on March 3, 1966 (R 142).

3. Attended the deposition of Jack R. Simpson taken by attorneys for McEwen on March 7, 1966 (R 142).

4. Attended the deposition of Doris Fleck, medical records librarian at Providence Hospital, taken by attorneys for McEwen on March 7, 1966 (R 185).

5. Did not contest in any way a motion for inspection and copying 'all written statements of witnesses to the occurrence which is the subject matter of the complaint including any and all written statements of the defendants or the plaintiff which may be in the possession of the defendants. . . including photographs and diagrams of the scene' filed on February 25, 1966 and granted by the Superior Court on March 10, 1966. (R 209-211).

Additionally on March 31, after sending the letter of arch 16 to appellees concerning the suit in question, ppellant stipulated with attorneys for plaintiff, McEwen, to ake the deposition of Charles McEwen at Salt Lake City, tah on April 9, 1966 (R 187, 225).

Notice of the taking of depositions, together with ubpoenas for appearances were served on witnesses Bryant, rewster, Knight, Charlotte, Eaulsos and Reardon for March 9 nd 10 at Seldovia, Alaska but such depositions were not taken ecause bad weather prevented the attorneys from getting to eldovia, Alaska (R 226). However, the investigator working n behalf of McEwen did discuss the case with the witnesses ryant, Brewster and Reardon at the time of service of said apers on March 1, 1966 (R 226).

The complete character of the lawsuit was set by the onduct of the attorneys for the City of Seldovia. The theory f defense and the depositions taken were undoubtedly taken to

support the theory chosen. Rightly or wrongly the unasked and unanswered questions concerning any other theory would be foreclosed because now the witnesses whose depositions had been taken would always be subject to impeachment for not answering such questions at their depositions.

No two lawyers approach a lawsuit the same way, and certainly no two lawyers try a lawsuit the same way. The company has chosen its counsel because of a recognition of a method of preparation and trial with which they are familiar so they should not have to abandon such for the uncertainty of preparation and trial over which they exercise no control.

Again preparation and trial by attorneys and claims managers familiar with all phases of tort litigation must be considered generally superior to the same approach by those less specialized. The control exercised by the attorneys for the City of Seldovia was unfortunate but nevertheless was a choice which was fatal to their claim.

III. ARGUMENT IN ANSWER TO CONTENTION OF THE CITY OF SELDOVIA THAT APPELLEE HAS THE BURDEN OF PROVING PREJUDICE FOR FAILURE TO FILE SUIT PAPERS.

In the memorandum of decision filed by the United States District Court for the District of Alaska (See Record 237-239) the court held that on the basis of the reasoning and authorities contained in plaintiff's memo in opposition to defendant's motion for summary judgment, the appellee was entitled to summary judgment as a matter of law. (Entire decision set forth in the Statement of Case.)

In such memorandum on pages 6, 7, 8 and 9 (Record 163-166) it was argued that any delay under condition number 10 of the policy would be a violation of a condition precedent to recover under the policy and no prejudice need be shown by the insurer in order to establish the lack of right of recovery on the part of the appellant herein.

The finding of the United States District Court was to the effect that under Alaska Law, no prejudice need be shown in order to show a failure to comply with the terms and conditions of the policy and thus bar recovery herein. This finding of the United States District Court as to the law of Alaska where there are no Supreme Court of Alaska cases should be accepted on review by the Ninth Circuit Court of Appeals <u>unless shown to be clearly wrong</u>. See <u>Bonet v. Texas Company, Inc.</u>, 308 U.S. 463, 84 L.Ed. 401, 405 (1940).

See

Insu

Scot

Insu

The Ninth Circuit Court of Appeals has followed this iew as recently as the opinion of Owens v. White, 380 F.2d 10, 315 (9th Cir. 1967) where the court stated as follows:

> "Analysis by a District Judge of the law of the state in which he sits, his determination of the result which the highest court of that state would probably reach under the same facts, is entitled to great weight. (Citation omitted). That determination 'will be accepted on review unless shown to be clearly wrong.'" (Citations omitted).

An almost identical quote is found in the case of innesota Mutual Life Insurance Company v. Lawson, 377 F.2d 25, 526 (9th Cir. 1967):

> "The parties agree that we are to look to the law of the State of Minnesota. (Citations omitted). The United States District Court for the District of Minnesota construed the same policy as the trial court in this case construed it:
>
> > The district court's considered view as to the law of the state in which it sits is entitled unless shown to be clearly wrong. (Citations omitted). Appellant has failed to demonstrate that the view of the Minnesota law stated by the District Court of the District of Minnesota was 'clearly wrong.'"

ee also the cases of Globe Indemnity Company v. Capital nsurance and Surety Company, 352 F.2d 236, 238 (9th Cir. 1965); cott v. Stocker, 380 F.2d 123, 126 (10th Cir. 1967); Capital nsurance & Surety Company v. Globe Indemnity Company, 382 F.2d

23, 626 (9th Cir. 1967); Employers Mutual Casualty Company v. FA Mutual Insurance Company, 384 F.2d 111 (10th Cir. 1967); reat-West Life Assurance Company v. Levy, 382 F.2d 357, 359-60 (10th Cir. 1967).

As stated by the Bonet (84 L.Ed. 401, 405-406) case by he United States Supreme Court and reiterated by the Ninth ircuit in the Globe Indemnity Company v. Capital Insurance ompany case found in 352 F.2d 236 at 238, it is not enough hat the Circuit Court of Appeals disagree with the interpre-ation, the error must be clear or manifest before it should everse the interpretation as to local law as found by the nited States District Court Judge:

> "We now repeat once more that admonition. Merely adding lip service to that rule is not enough. To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with the interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations, that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

It is clear, under the annotation found in 18 A.L.R.2d 43, notes 24 and 25 and the supplements to American Law

ar

not

ati

that

and

compa

stand

the f

Reports published in 1965, that there is a split of opinion concerning the need for a showing of prejudice in this particular area. While there is area for disagreement it is suggested to the court that the interpretation of the District Court Judge is quite reasonable under the circumstances and n line with the decisions of Hart v. National Indemnity Company, 422 P.2d 1015, 1022 (Alaska 1967) and Pepsi Cola Bottling Co. of nchorage, Inc. v. New Hampshire Insurance Co., 433 P.2d 670, 674-675 (Alaska 1967) which restrict the sweep of insurance nterpretation in Alaska.

The findings of the trial judge that complaint was filed in the Superior Court on December 13, 1965 and that on anuary 17, 1966 the city had filed its answer, but that no notice of the suit was given until March 16, 1966 was a violation of condition number 10 of the policy which required hat notice of the suit be immediately forwarded to the company nd thus, under section 12 there was no action against the company on the policy in question. This interpretation must tand because it is not clearly erroneous and is in line with he facts as stipulated to.

V. THE ACTS ALLEGED IN THE COMPLAINT OF CHARLES McEWEN ARE NOT WITHIN THE COVERAGE OF THE POLICY SO APPELLEE HAD NO DUTY TO DEFEND SUCH SUIT.

Even if the Court follows the position urged by the ppellant the appellant is not entitled to recover against ppellee for there has been no breach of contract because the omplaint by Charles McEwen against appellant does not allege laims which are within the coverage of appellee's policy of nsurance.

Before discussing jurisdictions which have ruled on rovisions similar to those in the policy herein, it is ecessary to examine Alaska Law to determine whether or not his argument may be advanced for the first time on appeal of his cause of action for such an argument was not presented o the trial court.

In the case of <u>Ransom v. Haner</u>, 362 P.2d 282, 285 Alaska 1961), the Supreme Court of Alaska held that it was ermissible on appeal to urge for the first time that a ecision of the trial court should be upheld for reasons not dvanced in the trial court. In disposing of an argument made or the first time on appeal that the appellant's exclusive emedy was under Workmen's Compensation, the Supreme Court of laska stated:

> "The defendants in their brief urge upon us two other questions that we should consider here, though not raised by them or considered by the

> trial court in the hearing on the motion for summary judgment. The first question is whether the plaintiff assumed the risk of any injury in the performance of his work under the circumstances set forth in the complaint and amplified by the affidavits; and the second question is whether the plaintiff's exclusive remedy was under the Alaska Workmen's Compensation Act. In this connection the defendants argue that, if there are any grounds for upholding the summary judgment on their behalf, regardless of whether they are the grounds set forth by the trial judge, the judgment should be affirmed. We agree, for it is a rule of law that an appellee may urge, and the appellant court should consider in defense of a decree or judgment any matter appearing in the record, even if rejected below and even if appellee's argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

Since the case at bar is based upon diversity of citizen-hip under 28 U.S.C.A. 1332 and the general rule is that the ircuit Court of Appeals should apply the law of the state here the dispute arose [*Erie Railroad Co. v. Tompkins*, 304 U.S. 4, 82 L.Ed. 1188 (1938)], it is urged that the Ninth Circuit hould adopt the Alaska rule in considering this case.

However, in order to avoid embroiling the court in a ontroversy over whether the rule of law stated by the laska Supreme Court is procedural or substantive, it should e noted that the same rule has been applied by the United

States Supreme Court in the case of *Jaffle v. Dunham*, 352 U.S. 280, 281, 1 L.Ed.2d 314, 315 (1967) where the Supreme Court stated:

> "A successful party in the District Court may sustain its judgment on any grounds that finds support in the record. . . ."

A similar view was expressed by the Ninth Circuit Court of Appeals in *Commissioner of Internal Revenue v. Stimson Mill Co.*, 137 F.2d 286, 287 (9th Cir. 1943) and is further explained in the annotation in 1 L.Ed.2d 1820, 1821 as follows:

> "Without taking a cross appeal, the appellee may not attack the judgment below for the purpose of obtaining a modification thereof in his favor, but may urge in support of the judgment below any matter in the record, although his argument may involve an attack upon a ruling of the court below or an insistence upon matters overlooked or ignored by it. . . ." (p. 1821).

Therefore, a review of case authorities concerning decisions on similar policy provisions is made to establish the validity of the proposition urged herein that said claims are not within the coverage provided by the policy and thus there is no duty to defend this cause of action.

A. Introduction.

In the case of *Theodore v. Zurich General Accident & Liability Co.*, 364 P.2d 51, 55 (Alaska 1961) the Supreme

aga

cou

acci

spec

ourt of Alaska held that the duty of the insurance carrier to defend was controlled by the allegation made in the omplaint:

> "Zurich promised its insured to defend any suit 'alleging' bodily injury or death under the employer's liability coverage in the policy, even if such suit were 'groundless, false or fraudulent.' This language means that the obligation to defend exists when the injured party asserts a claim which, as a claim, is for loss covered by the policy. It is the allegation made in the complaint that controls. If it comprehends an injury that may be within the policy, then the promise to defend includes it. The promise is not contingent upon the allegation being true. It may not be. But the burden of establishing this - is showing that the suit is 'groundless' is one which Zurich agreed to assume."

The complaint in the case brought by Charles Ramon McEwen gainst the City of Seldovia (R 171-179) alleged three specifi ounts as follows:

Count I - Assault and Battery by using unreasonable and unnecessary force (R 171-175).

Count II - False Imprisonment from unlawful arrest (R 175-176).

Count III - Trespass by wilful, malicious and reckless acts (R 176-178).

The insurance policy in force on the day of the ccident (R 224, 9-31, 38-60, 66, 79-100, 114, 115-137) pecifically provided coverage as follows:

> "Coverage B. To pay on behalf of the insured all sums which the insured

> shall become legally obligated to
> pay as damages because of bodily
> injury, sickness or disease,
> including death at any time
> resulting therefrom, sustained
> by any person and caused by
> accident." (See R 28, 57, 80,
> 116).

Under printed section (h) of the Condition Section of the policy (R 30, 59, 82, 118) the following definition is found:

> "(h) Assault and Battery - Assault
> and battery shall be deemed an
> accident unless committed by or at
> the direction of the named insured."

Further, there is attached to the policy a typewritten endorsement (R 25, 54, 96, 133) which reads as follows:

> "It is hereby agreed that no coverage
> is afforded by this policy with
> respect to Assault and/or Battery
> whether committed by the insured or
> any employee of the insured."

The question thus clearly becomes whether the allegations of the complaint against the City of Seldovia (R 171-179) there is asserted a claim which is for a loss covered by the policy. More precisely, the three following questions are posed:

1. Is Assault and Battery by Abe Thomas, Police Chief of Seldovia covered by the policy as an accident?

2. Is false imprisonment of Charles McEwen by Abe Thomas covered by the policy as an accident?

3. Is trespass by Abe Thomas covered by the policy as an accident?

Each of these questions will be discussed in turn to how there is no duty to defend the cause of action and thus here is no breach of such duty at the present time.

B. Assault and Battery by Abe Thomas is not Within the Coverage of the Policy.

1. The Typewritten Policy Endorsement Controls and Assault and Battery is not Within Coverage of the Policy.

While the original policy provisions contain the statement that assault and battery would be considered an accident nless committed at the direction of the insured (R 30, 59, 82, 18), there is a typewritten endorsement attached to the policy hich specifically states:

> "It is hereby agreed that no coverage is afforded by this policy with respect ot Assault and/or Battery whether committed by the insured or any employee of the insured."
> (R 25, 54, 96, 133).

The Supreme Court of Alaska has previously ruled in the ase of Pepsi Cola Bottling Co. v. New Hampshire Insurance Co., 07 P.2d 1009, 1012 (Alaska 1965) that the typewritten portion ould control as being the more deliberate expression of the ntention of the parties.

> "Appellant refers us to a rule of construction which we are in agreement that where a policy is partly printed and partly written, the writing controls as being the more deliberate expression of the intention of the parties."

Thus, under the endorsement there would be no coverage for assault and battery under the policy. In Argument No. IV of Appellant's Brief (pp. 27-28) appellant contends that the endorsement was not effective until November 4, 1965. This, however, flies in the face of the endorsement itself which states that it was to be effective from August 19, 1965 and the previous admissions of appellant in the trial court that the policy, including said endorsement, was effective at the time of the accident in question. See the following documents and statements:

> 1. See Amended Complaint, paragraph IX concerning the policy and endorsements thereto being in affect as to September 10, 1965 (R 75A) and Answer of City of Seldovia admitting the attached insurance policy was in effect on the day in question (R 111).
>
> 2. See Request for Admissions, October 19, 1966 (R 114) which provided that the City of Seldovia admit:
>
> > (a) That the following attached copy of the General Automobile Liability (policy) contains the identical terms and conditions as the policy of plaintiff in force on the date of the incident in question herein, and further

qual

> (b) That such copy is identical in all respects to the policy in force except for signatures which were on the original policy.

No answer was ever filed to the Request for Admissions.

3. The Stipulation of Facts No. 5 (R224) which provided as follows:

> That on the 10th day of September, 1965, there was in force and effect a policy of insurance issued by the plaintiff in favor of the defendant City of Seldovia, Policy No. E35-2049-81 and a copy of the policy has been introduced into evidence.

2. Assault and Battery by Abe Thomas as Police Chief of the City of Seldovia Would be "Assault Committed by or at the Direction of the Insured" and Thus Would be Outside the Coverage of the Policy.

In any event, there would be no coverage in the case at ar because the assault and battery was done at the direction f the named insured, Abe Thomas, the Police Chief of the City f Seldovia.

The assault and battery definition provides specifically s follows:

> "Assault and battery shall be deemed an accident unless committed by or at the direction of the insured." (R 30, 59, 82, 118).

In the insuring agreement herein (R 28, 57, 80, 116) the nqualified word "insured" was defined as follows:

> "The unqualified word 'insured' includes the named insured and also includes (1) under coverages B and D any executive officer, director or stockholder thereof while acting within the scope of his duties as such, and any organizational proprietor with respect to real estate management for the named insured, and if the named insured is a partnership, the unqualified word 'insured' also includes any partner thereof but only with respect to his liability as such. . . ."

The police chief of the City of Seldovia was in the ourse of his duties in arresting an officer as alleged in he complaint and would be one of the few executive officers f the City of Seldovia which cannot act except through its gents. Therefore, the unqualified word "insured" herein ould include the chief of police and his actions. Bouis v. mployers' Liability Assurance Corp., 160 So.2d 36, 38 La. Ct. App. 1963).

An example of this particular doctrine is found in the ase of Roberts v. R & S Liquor Stores, Inc., 164 So.2d 533, 35-536 (Fla. Ct. App. 1964) where the District Court of ppeals for the First District stated as follows:

> "In each of the two cases above cited, the assault complained of by the plaintiff was committed by an individual occupying the position of a manager in the employment of the insured corporate defendant. In each case the liability policy sued upon excluded from its coverage an assault and battery committed by or at the direction of the insured under the policy. These facts squarely fit the facts in the case we now review. In each case it was held that the policy provided no coverage for

> the insured, nor was it liable to the injured plaintiff for the damages suffered by him. Based upon the authorities, we are constrained to the view and so hold, that the trial court in the case sub judice correctly held that the garnishee insurance company was entitled to judgment as a matter of law. The summary judgment appealed herein is accordingly affirmed."

A similar finding was made by the appellate division of the Supreme Court of New York in the case of Greater New York Mutual Ins. Co. v. Perry, 178 N.Y.S.2d 760, 763 (App. Div. 1958) where the appellate division of the New York courts held that the Vice-President of the defendant corporation, the managing agent in charge of the apartment building, who assaulted the tenant in the apartment building was acting on behalf of the corporation and, therefore, the actions came within the prohibition of the policy which stated that assault and battery should be deemed an accident unless committed by or at the direction of the named insured:

> "The alleged assault by Frankel, acting as an officer of Hanover and in the course of his duties as Hanover's managing agent, is an assault by the named insured, Hanover, within the meaning of the policy, and by its expressed provisions is excluded from the coverage thereof. . . ."

In the case of Portaro v. American Guaranty and Liability Ins. Co., 310 F.2d 897, 899 (6th Cir. 1962) the United States Court of Appeals for the Sixth Circuit, held that Portaro was

an officer of the insured corporation and thus his assault and battery upon a woman patron of a beauty parlor operated by the corporation was not an accident because the assault and battery had been committed by or at the direction of the insured.

> ". . . It is clear to us that, as amended, the intention of the policy before us was to protect all included within the meaning of 'insured' against liability for 'occurrences.' It is equally clear to us that when by clause 3(d) which provided that "an assault and battery shall be deemed an occurrence unless committed by . . . the insured.' The intention to refuse coverage to Portaro, and insured within the meaning of the policy, for an assault and battery committed by him is manifest."

See also the cases of McCarthy v. Motor Vehicle Accident Indemnification Corporation, 224 N.Y.S.2d 909, 915-916 (App. Div. 1962); DeLuca v. Coal Merchants Mutual Insurance Co., 59 N.Y.S.2d 664 (App. Div. 1945); McLaughlin v. New York Edison Co., 169 N.E. 277, 278 (N.Y. 1929); Farm Bureau Mutual Automobile Ins. Co. v. Hammer, 177 F.2d 796 (4th Cir. 1949). See also Oregon cases of MacDonald v. United Pacific Ins. Co., 311 P.2d 425, 432 (Ore. 1967); Isenhart v. General Casualty Co. of America, 377 P.2d 26, 28 (Ore. 1962) for cases that it is against public policy to insure persons for their deliberate wrongs.

C. False Imprisonment and Trespass are not Accidents Within the Policy Terms and Thus There is no Duty to Defend Such Counts.

Appellant makes no mention of Counts II and III of the complaint and apparently concedes they would be outside the coverage of the policy. The following section is added for the sake of completeness and is not intended to be more than a simple outline of the problem and the correctness of the concession.

Dean Prosser in his work Prosser On Torts § 12 on page 50 (3rd Ed. 1964) notes that there must be an intent to confine before there is false imprisonment.

> "There is no false imprisonment unless the defendant intends to cause a confinement, whether of the plaintiff or another. There may, however, be liability for any negligence in such a case, if actual damage results. It has been held that a mere incidental confinement due to acts directed at another purpose as, for instance, locking the door with the plaintiff inside for the sole purpose of keeping others out is not a sufficiently important invasion of the plaintiff's interests to require the protection of the law."

A similar intentional act is pleaded in the case at bar for the trespass alleged in Count III. See Restatement of Torts, § 158, on page 359.

These intentional acts by Thomas as agent for the City of Seldovia, are not covered by the insurance policy which

ss

a.

e c

tion

stod

wen

de h

specifically provides in coverage B of the insurance policy of the City of Seldovia "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person and caused by accident." (R 28).

See cases where intentional trespass held not an accident within policy terms: M. R. Thomason v. United States Fidelity & Guaranty Co., 248 F.2d 417, 419 (5th Cir. 1957); Langford Electric Co. v. Employers Mutual Indemnity Corp., 297 N.W. 843, 847 (Minn. 1941); See 23 Insurance Counsel Journal 33, 37 (1956); case where false imprisonment was an intentional act not within coverage. Lively v. City of Blackfoot, 416 P.2d 27, 30-31 (Idaho 1966); Capachi v. Glenn Falls Insurance Co., 30 Cal. Rptr. 323, 326 (Ct. App. 1963); and cases where assault and battery is held not to be an accident under similar terms. Johnson v. Combined Insurance Co. of America, 158 So.2d 63, 65 (La. Ct. App. 1963); Cordon v. Indemnity Ins. Co. of North America, 123 F.2d 363, 364 (6th Cir. 1941); Bowen v. Lloyds Underwriters, et al, 162 N.E.2d 65, 66 (Mass. 1959).

In any event, the actual terms of Counts II and III of the complaint make it clear that the suit is for the intentional actions of Abe Thomas in taking Charles McEwen into police custody by deliberate trespass and arrest which violated McEwen's rights. The fact that he resisted the arrest only made his actions also intentional, but has no real bearing on the coverage problem.

Since there would be no duty to defend for such allegations, it follows that there has been no breach of contract for the failure to defend. The trial court was thus correct herein in its decision and said decision should be upheld on appeal.

CONCLUSION

For the forgoing reasons, it is urged that the decision of the District Court for the District of Alaska should be affirmed.

DATED: July 2, 1968

Respectfully submitted,

HUGHES, THORSNESS, LOWE,
GANTZ & CLARK
Attorneys for Appellee
Employers' Liability
Assurance Corporation, Ltd.

By Robert C Erwin
ROBERT C. ERWIN